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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO MENDOZA, Defendant and Appellant.	C084129 (Super. Ct. No. STK-CR-FE-2015-0006632)

Following a mistrial on two counts and an acquittal of one count, a second jury convicted defendant Heriberto Mendoza of two counts of committing lewd acts on his granddaughter when she was between six and eight years old. Defendant raises instructional and evidentiary error primarily involving the admission of evidence of uncharged acts and the acts involving the count he was acquitted of in the first trial. Finding no reversible error, we affirm.

FACTS

The Prosecution's Case: Three of defendant's victims testified at trial—the victim of the charged offenses in this case; her mother I.S., defendant's stepdaughter; and J.H., who alleged that defendant had molested him on two occasions when he was about six or seven years old. We will report the incidents in the order in which they were committed, beginning with J.H.

J.H.: J.H.'s father knew defendant when they both lived in Mexico. Before J.H. was born, defendant lived with J.H.'s father, mother, and siblings. When J.H. was about six or seven years old, his mother left him in defendant's care at defendant's house. J.H. testified that defendant told him to touch and kiss his chest. J.H. complied and touched and kissed defendant's chest around the nipple area.

On a separate occasion when he was six, J.H. asked defendant if he could watch a Ninja Turtles movie. Defendant had his penis out and told J.H. he could watch the movie if he touched and licked his penis. J.H. did as he was told.

J.H. did not tell anyone what defendant had done until he was 18 or 19 years old. A month later he reported the incidents to the police department.

I.S.: I.S. was sexually abused by her biological father for several years. I.S. complained to her mother about the abuse, but her mother told her to tell her if it happened again. Ultimately, her father was charged and convicted. Her mother moved I.S. and her two siblings to Northern California. She dated a man with whom I.S. felt comfortable. But then her mother met and married defendant and I.S. and her siblings moved into defendant's home.

I.S. testified that defendant made her feel extremely uncomfortable. When she was left alone with defendant, he would tell her she was pretty. She described defendant caressing her thigh provocatively and stroking her hair. She testified that when defendant hugged her, "he was feeling on me." Contrasting the way defendant made her feel to her mother's previous boyfriend, she explained: "And then when -- with Heriberto it was

just -- it was different, it was just, like, I felt, like creepier, like the way he would approach me and -- and how I just didn't -- I didn't like it, the way his caressing was, it wasn't like a caress, like how you caress a little kid and you hug them. It was different. It was like more -- it felt really sexual to me."

On one occasion when she was 13, 14, or 15 years old, I.S. came home with hickeys on her neck. She was sent to her room. According to I.S., defendant followed her into her room, locked the door, and asked her if "she would like to be kissed by a grown man." Her mother tried to get into the room and defendant jumped up and opened the door. Her mother asked why the door was locked and an argument between defendant and her mother ensued.

I.S. ran away at least twice. She told the police officer she did not want to return because defendant made her uncomfortable. She never moved home, but after several months, she agreed she would respect defendant when she was at the house and they resumed a relationship. She testified they had gotten over the past and it felt like they had a normal family.

I.S. gave birth to a baby girl, E.R., when she was 17 years old. Her mother had two additional children with defendant. Her mother's youngest child was only a year older than E.R. The two grew up together as sisters. I.S. took E.R. to her mother's house frequently and often asked her to babysit. E.R. spent a lot of time with her grandparents. I.S. explained that she believed defendant's inappropriate behavior was directed specifically toward her and she never thought he would do anything inappropriate to a very young child.

E.R.: According to E.R., however, defendant would and did. He was tried on two counts, which were identified on the jury verdicts as the couch incident and the kitchen incident. E.R. testified these incidents occurred when she was between the ages of six and eight. On one occasion, she was sitting on the edge of the couch and defendant

started to lift her shirt and kiss her chest. The touching and kissing made her feel uncomfortable but she did not tell him to stop.

During the kitchen incident, defendant got down on his knees, lifted up E.R.'s shirt, kissed her chest, and licked her breast area. He sucked on her breast with his tongue. He grabbed her waist while he was "kissing her area." E.R. told defendant this made her uncomfortable and he stopped. That was the last time anything inappropriate like that happened.

E.R. also testified to a third incident occurring in the bathroom. Defendant had been acquitted of this incident during the first trial. She testified that while she was in the bathroom with defendant, he got down on his knees and kissed her breasts.

E.R. did not disclose what her grandfather had done for many years. When shown a Facebook post of her grandfather with other family members in Honduras, she asked her mother if her father had ever touched her. Her mother asked why she was asking and E.R. responded, because "Grandpa touched me too." The family had planned a trip to Honduras and, despite E.R.'s accusations, they decided to make the trip even though defendant would be there. I.S. told some family members about E.R.'s accusations while they were in Honduras and told others, including her mother, when they returned to the United States. They then confronted defendant. They reported the conduct to law enforcement a few days later.

Child Sexual Abuse Accommodation Syndrome: A psychologist who was also a professor and director of The Care Center, a sexual abuse treatment program, educated the jurors about the components of Child Sexual Abuse Accommodation Syndrome. Victims of child abuse often do not disclose the abuse because they feel threatened or intimidated and feel as if they cannot do anything about their circumstances. Most children do not disclose abuse right after it occurs. In fact, one-third of child abuse victims do not disclose abuse prior to turning 18 years of age. The psychologist also testified that child victims most often remember "the big things" about the abuse, but

they have difficulty recalling details. False allegations, he insisted, while possible, are very rare.

The Defense: Defendant, his wife, and children testified on his behalf along with many of their friends who attended the same church. Defendant denied all of the allegations and supporting witnesses found the notion he would commit a lewd act on a child incredulous; no one had ever seen him act inappropriately around children.

Defendant, however, admitted kissing E.R. on the mouth. He also admitted he had been alone with her in the kitchen on at least one occasion. He denied asking J.H. to lick his penis or kiss his chest. He denied asking I.S. if she wanted a grown man to kiss her or locking the door after she returned home with hickeys. He speculated on how E.R. might have misconstrued two occasions when he demonstrated affection for her.

Defendant's wife, who is also the victim's grandmother, supported her husband. She testified she did not believe E.R.'s allegations. She never saw defendant act inappropriately with I.S. or E.R. She insisted I.S. had hated defendant since she was a teenager and I.S.'s mother assumed it was because defendant tried to discipline her daughter. Although she knew I.S. had accused her biological father of sexually abusing her, she allowed the abuse to continue before finally leaving him. She knew about the allegations that defendant had molested another child but she did not inform any of her children who, by then, had their own children. She offered her granddaughter no support after she disclosed what defendant had done to her.

Paula, defendant's youngest child with E.R.'s grandmother, testified that when they were young, E.R. would say she was scared and ask Paula to accompany her to the bathroom.

The second jury convicted defendant of the two counts as charged. Defendant appeals.

DISCUSSION

I

We agree with defendant that two notable mistakes were made during his second trial. The question before us is whether either or both necessitate a reversal. We conclude they do not.

The first was a clerical mistake in the jury instruction defining the crime charged. The court instructed the jury as follows: "The defendant is charged in Counts 1 and 3 with committing a lewd or lascivious act on a child under the age of 14 years in violation of Penal Code section 288(a).

"To prove that the defendant is guilty of this crime, the People must prove that:

"1A, as to [E.R.] the defendant willfully touched any part of a child's body either on the bare skin or through the clothing;

"Or, 1B, as to [J.H.] the defendant willfully caused a child to touch his own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing;

"2, the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child . . . ." (CALCRIM No. 1100, as given.)

The mistake was obvious: defendant was not charged with any offense involving J.H. Relying on inapposite authority, defendant valiantly and creatively tries to transform the transparent mistake into an error of constitutional significance. His argument is built on the following logic. The jury was given the option to convict defendant of a lewd act by finding him guilty either of the charged offense against E.R. beyond a reasonable doubt or by finding him guilty of the uncharged crime against J.H. by only a preponderance of the evidence. The "conflation of the charged and uncharged crimes in the instruction on the elements of the crime created confusion on the relevance of the

preponderance standard to the jury's analysis and created the danger that they applied it to the charged crime as well." Thus, the instruction violated defendant's Sixth and Fourteenth Amendment rights to a reliable determination of the elements of the current charges and to a determination of his guilt beyond a reasonable doubt.

"When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) The question, therefore, is not whether there is a theoretical possibility of confusion, but whether in the context of the amended information, all of the instructions, the closing arguments, and the signed jury verdicts, there is a reasonable likelihood the jury misapplied the instruction and diminished the burden of proof. On this record, we conclude there is no reasonable likelihood the jury found defendant guilty based only on a finding by a preponderance of the evidence of the uncharged crime. We examine the mistake in the context of the entire proceedings.

First, the amended information and the rest of the instructions made it abundantly clear that defendant was charged with two counts involving the kitchen incident and the couch incident against E.R. only. Indeed, the court explained: "The People presented evidence that the defendant committed the crimes of, with [I.S.], annoying or molesting a child; with [J.H.], lewd or lascivious act, child under 14, that were not charged in this case." (CALCRIM No. 119, as given.) The amended information also alleged that the crimes occurred between October 2003 and October 2007. E.R. testified that the kitchen and couch incidents occurred somewhere between October 2003 and October 2007. The unanimity instruction confirmed the same time period. The court instructed the jurors they must agree on the acts occurring between October 2003 and October 2007 to find defendant guilty of counts 1 and 3. The uncharged offenses against J.H., however, occurred in the mid-1990's.

Closing arguments have been used to dispel any theoretical misunderstanding. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on a different ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) In closing, the prosecutor argued: "So the first count, Count 1, what does that one address? That's the incident in the living room, on the couch. Okay? So what we have is one that he willfully touched any part of the child's body. It can be the bare skin or through the clothing.

"And here we have between the periods of 2003 to 2007, we have that it's at [defendant's] house, and we have [E.R.] saying she was on the couch, watching TV with [defendant].

"And while she was on the couch [defendant] lifted her shirt.

"And that [defendant] kissed, sucked and licked her breasts.

"So what we're now talking about is that [defendant] willfully touched a child's part -- body part. And we have that through [E.R.]'s testimony."

The prosecutor was just as clear in describing count 3. "The kitchen incident. So what's the willful touching that we have here? Again, it's -- between the date 2003 and 2007, where -- [defendant's] house in Stockton. But in this situation [E.R.] finds herself in the kitchen and [E.R.] says that [defendant] gets on his knees, grabs her waist, lifts her shirt, and again starts kissing, sucking, licking her nipples."

The jury's signed verdicts also specified the jurors found defendant guilty of committing lewd acts against "E.R." and that such acts occurred between October 2003 and October 2007.

Thus, defendant was charged with misconduct against E.R. only, the jury expressly was instructed he was not charged with any offense involving J.H., the prosecutor clarified the specific conduct constituting the charged offenses and identified the time frame that only involved E.R., and the jury signed verdicts identifying lewd acts against E.R. The mistake in the one instruction inserting J.H. was sloppy and unfortunate. But given the entire context of the proceedings, it is not reasonably likely

that the jurors confused who the victim was or diluted the burden of proof from beyond a reasonable doubt to a mere preponderance of the evidence. Simply put, the mistake was not prejudicial.

Nor do the two cases defendant cites dictate a different result. In *People v. Vichroy* (1999) 76 Cal.App.4th 92 and *People v. Orellano* (2000) 79 Cal.App.4th 179, the jurors were instructed that if they found the propensity evidence true they could find the defendants guilty of the charged crimes. As the court concluded in *Vichroy*, "The constitutional infirmity arises in this case because the jurors were instructed that they could convict appellant of the current charges based solely upon their determination that he had committed prior sexual offenses. CALJIC No. 2.50.01, as given, required no proof at all of the current charges." (*Vichroy*, at p. 99.) Here, by contrast, the jury was instructed: "If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the charged crimes]. The People must still prove each charge beyond a reasonable doubt." (CALCRIM No. 1191, as given.) The instructions given to the jury in this case, despite the mistaken reference, do not suffer from the same fatal infirmity found in *Vichroy* and *Orellano*.

The second mistake identified by defendant, however, is more troubling. Defendant, as mentioned, was acquitted by a jury in his first trial, of a second count identified as the bathroom incident. When E.R. first reported defendant's lewd conduct, she did not mention the bathroom incident. She later told the police about that incident. At his second trial, the prosecutor introduced evidence of the then uncharged misconduct involving the bathroom incident, but she did not introduce evidence that defendant had been acquitted of the charge and the court did not instruct the jury on the acquittal. Defendant contends the failure to do so constitutes reversible error. But once again, after carefully scouring the entire record, we must agree with the Attorney General that when the unanimity instruction is viewed in the context of the charging documents, the

evidence, closing argument, and the verdict forms, there is no reasonable likelihood that the jury misapplied the unanimity instruction to improperly convict defendant for conduct pertaining to the bathroom incident. As a result, the acquittal was given its preclusive effect and there was no double jeopardy.

The jury was instructed: "The defendant is charged with lewd and lascivious act: child under 14, Counts 1 and 3, sometime during the period of October 2003 to October 2007.

"The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." (CALCRIM No. 3500, as given.)

The potential problem, in defendant's view, was that the evidence of a lewd act in the bathroom, under this unanimity instruction, might have been used to convict him. But, as pointed out *ante*, other instructions, the argument, and the evidence made it abundantly clear to the jurors that count 1 pertained to the lewd acts that occurred on the couch and count 3 pertained to the lewd acts that occurred in the kitchen. Thus, there was no danger that the jury used the bathroom incident to convict defendant on either or both counts.

The amended information named count 1 as the "couch incident" and count 3 as the "kitchen incident." E.R. clearly distinguished the three distinct incidents during her testimony at trial.

Closing argument provided additional clarity. As quoted above, the prosecutor differentiated the couch incident, count 1, from the kitchen incident, count 3. But more importantly, defense counsel argued that the family had "[E.R.] go and contact the police, and when she contacts the police she tells the police of two incidents. [¶] Couple months later she goes and talks to the police again, has an interview, and now it's up to three, three incidents. [¶] One of those is not before you because [defendant] was found not

guilty, at the last trial, of that incident. So now we're left with two incidents." Defense counsel also distinguished the evidence of what defendant did on the couch from the testimony about what he did in the kitchen.

Thus, defendant's own attorney provided the information to the jurors he claims they needed. In other words, his attorney explicitly told them the defendant had been acquitted of any lewd acts that occurred in the bathroom. And while the jury was instructed that arguments of counsel are not evidence, his attorney's statement on this point was presented without objection by either the prosecution or the court.

The jurors' verdicts reflect the same clarity. Each verdict referred to the relevant count and identified the relevant dates and relevant location. The jurors were well aware that the only acts upon which they needed to agree were those that occurred either on the couch or in the kitchen. The gratuitous information that E.R. accused him of yet a third incident in the bathroom was not reflected in any of the instructions, argument, or evidence. While we agree it would have been advisable for the court, not his lawyer, to instruct the jury that they were not at liberty to find the acts that occurred in the bathroom as the basis for a conviction, we do not find it reasonably likely the jurors misunderstood the instructions and utilized the conduct for which he had been acquitted as a basis for his conviction of the two other counts.

Defendant has a constitutional right not to be placed in jeopardy twice for the same offense and it is our solemn duty to ensure that his right was not abrogated in his second trial. We remain troubled that the prosecutor solicited testimony about acts for which defendant was acquitted without introducing evidence of the acquittal, that defendant's lawyer did not object, and that the trial court did not carefully tailor the unanimity instruction to curtail any risk that defendant's conduct in the bathroom did not constitute the basis for the conviction. But the risks the abrogation of those duties might engender are only theoretical and, on this record, we conclude there simply was no risk the jurors utilized the conduct in the bathroom to find defendant guilty of the lewd acts he

performed in the kitchen and on the couch. We therefore reject defendant's contention that the judgment must be reversed.

While we have acknowledged that there were two mistakes made during defendant's trial, we do not characterize either one of them as instructional error because, as we have explained, there is no reasonable likelihood that the jurors construed the instructions in the manner in which defendant has alleged. We add, however, that even if the mistakes are considered error, we conclude they were harmless beyond a reasonable doubt and they do not undermine our confidence in the outcome of the trial. The properly admitted propensity evidence was compelling. The victim's testimony was credible and showed remarkable similarity to defendant's pattern of abusing young children. The amended information, testimony, argument, and verdict forms all focused the jury's attention on the two counts of lewd conduct on the couch and in the kitchen involving E.R. Thus, if the mistakes are characterized as instructional error, they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].)

II

Defendant contends the trial court abused its discretion by allowing evidence of his uncharged conduct toward I.S. as propensity evidence pursuant to Evidence Code section 1108. "[T]he admissibility of uncharged conduct pursuant to [Evidence Code] section 1108 turns on the existence of a preliminary fact—namely, that the uncharged conduct constitutes a statutorily enumerated 'sexual offense.' [Citation.] The trial court must make a preliminary determination of whether the proffered evidence is sufficient for the jury to find, by a preponderance of the evidence, that the defendant committed an enumerated offense." (*People v. Jandres* (2014) 226 Cal.App.4th 340, 353.) Defendant asserts the uncharged conduct I.S. alleges does not constitute a statutorily enumerated sexual offense. We disagree.

The elements of a Penal Code section 647.6, subdivision (a) violation are as follows: "(1) the existence of objectively and unhesitatingly irritating or annoying conduct; (2) motivated by an abnormal sexual interest in children in general or a specific child; (3) the conduct is directed at a child or children, though no specific child or children need be the target of the offense; and (4) a child or children are victims." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396, fn. omitted.) Defendant insists his acts were not objectively annoying. In other words, they would not objectively unhesitatingly irritate or disturb a reasonable person.

I.S. testified that as a young girl she was extremely uncomfortable in the highly sexualized atmosphere defendant created, particularly in her mother's absence. He told her she was pretty. He stroked her hair and her thigh. While I.S. had not been uncomfortable in the presence of her mother's previous boyfriend, defendant was "creepy." She explained that he caressed her in a way that was inappropriate for touching a child. She also testified that as a young teenager, defendant had locked her in her room and, once alone with her, approached her and asked her if she would like to be kissed by a grown man.

Defendant minimizes this testimony with the insulting suggestion that each of these demonstrations of affection were normal interactions between a stepfather and his stepdaughter. According to I.S., they were not. Objectively, they were not. His conduct, as described by I.S., was unhesitatingly disturbing and offensive. He demeans his argument by further suggesting that because she had been sexually abused by her own father, she was hyper-sensitive to his lewd conduct. We reject his insensitive accusation that her credibility was diminished because she was abused by both of her mother's husbands.

Moreover, there was sufficient evidence his conduct toward I.S. was motivated by an unnatural or abnormal sexual interest. I.S. was under the age of 15 when defendant, her stepfather, demonstrated both an unnatural and abnormal physical attraction to her

and openly responded to her in a sexually provocative manner. We conclude, therefore, there was ample evidence to satisfy the elements of Penal Code section 647.6. As a consequence, defendant fails to establish that the trial court abused its discretion by allowing into evidence his uncharged conduct toward I.S.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

DUARTE, J.